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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	5
Statement	6
Reasons for Granting the Writ	8
I. The decision below is contrary to *Bigelow* v. *Virginia*	8
II. The ability of the press to disseminate news and commentary is unconstitutionally impeded by the decision below	9
III. To require a newspaper to defend protracted litigation, without requiring a constitutionally adequate showing of knowing or reckless falsity, violates First Amendment policy	11
Conclusion	14

APPENDICES

Appendix A—Opinion Below	1a
Appendix B—Opinion of the Court of First Instance	5a
Appendix C—Order denying permission to appeal to the New York Court of Appeals	13a
Appendix D—The Advertisement in Suit	14a
Appendix E—Letter to The Village Voice	16a
Appendix F—Affidavit of James C. Goodale, Executive Vice President of the New York Times Co.	17a
Appendix G—Affidavit of Edward R. Cony, Vice President and Executive Editor of Dow Jones & Company, Inc.	23a
Appendix H—Affidavit of Edward A. Miller, General Counsel to Harper & Row Publishers, Inc.	27a

CITATIONS

PAGE

Cases:

Bigelow v. Virginia, 44 L.Ed. 2d 600 (1975) 5, 8, 9, 14
Bon Air Hotel, Inc. v. Time, Inc., 426 F. 2d 858 (5th Cir. 1970) 12
Booth v. Curtis Publishing Co., 15 A.D. 2d 343, 223 N.Y.S. 2d 737 (1st Dep't), *aff'd*, 11 N.Y.2d 907, 182 N.E.2d 812, 228 N.Y.S.2d 468 (1962) 10

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 3
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L. Ed. 2d 328 (1975) 2, 3, 4

Dooley v. Carsen, 15 N.Y. 2d 908, 206 N.E.2d 651, 258 N.Y.S. 2d 643 (1965) 2

Garrison v. Louisiana, 379 U.S. 64 (1964) 13
Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) 3
Gotthilf v. Sills, 375 U.S. 79 (1963) 2
Grosjean v. American Press Co., 297 U.S. 233 (1936) 10

Ex parte Jackson, 96 U.S. 727 (1878) 10

Meeropol v. Nizer, 381 F. Supp. 29 (S.D.N.Y. 1974) 12
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 2, 3, 9
Mills v. Alabama, 384 U.S. 214 (1966) 4

Nash v. Florida Industrial Commission, 389 U.S. 235 (1967) 2
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 5, 11, 12, 14
North Dakota State Board of Pharmacy v. Snyder Drug Stores, 414 U.S. 156 (1973) 4

PAGE

Smith v. California, 361 U.S. 147 (1959) 10
St. Amant v. Thompson, 390 U.S. 727 (1968) 12

Time, Inc. v. McLaney, 406 F. 2d 565 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969) 12
Treutler v. Meredith Corp., 455 F. 2d 255 (8th Cir. 1972) 12

United Medical Laboratories v. Columbia Broadcasting System, 404 F. 2d 706 (9th Cir.), *cert. denied* 394 U.S. 921 (1969) 12

Valentine v. Chrestensen, 316 U.S. 52 (1942) 7

Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir.), *cert. denied* 385 U.S. 1011 (1967) 11, 12, 14
Williams v. Florida, 399 U.S. 78 (1970) 2

Constitutional Provisions:

United States Constitution, Amendments I and XIV *passim*

New York State Constitution, Article 6, §3 2

Statutes:

28 U.S.C. §1257(3) 2

New York Civil Practice Law and Rules §5602(b)(1) 2

New York Civil Rights Law §§50, 51 6

Miscellaneous:

Redish, *"The Pragmatic Approach to Appealability in the Federal Courts"*, 75 Colum.L.Rev. 89 (1975) 3
Stewart, *"Or of the Press"*, 26 Hastings L.J. 631 (1975) 10

IN THE

Supreme Court of the United States

October Term, 1975

No.

THE VILLAGE VOICE, INC., and SCALI, MCCABE, SLOVES, INC.,

Petitioners,

v.

DOMINIC S. RINALDI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

Petitioners pray that a writ of certiorari issue to the Supreme Court of the State of New York, Appellate Division, First Judicial Department, to review a judgment of that Court entered on March 11, 1975 (permission to appeal to the New York Court of Appeals was denied, May 13, 1975).

Opinions Below

The opinion of the Appellate Division is printed in Appendix A hereto, *infra,* p. 1a, and is reported at 47 A.D. 2d 180 and 365 N.Y.S. 2d 199.

The opinion of the court of first instance (Supreme Court of the State of New York, New York County) is printed in Appendix B hereto, *infra*, p. 5a, and is reported at 79 Misc. 2d 57 and 359 N.Y.S. 2d 176.

Jurisdiction

The judgment of the Appellate Division sought to be reviewed was entered March 11, 1974. Petitioners' timely motion for permission to appeal to the Court of Appeals was denied by the Appellate Division on May 13, 1975 (Appendix C, *infra*, p. 13a). Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Under the circumstances of this case, no appeal may be taken to the Court of Appeals, New York's highest court, without the permission of the Appellate Division. New York State Constitution, Art. 6, §3; New York Civil Practice Law and Rules, §5602(b)(1); *Dooley* v. *Carsen*, 15 N.Y.2d 908, 206 N.E.2d 651, 258 N.Y.S.2d 643 (1965). Accordingly, the judgment of the Appellate Division was rendered "by the highest court of a state in which a decision could be had" within the meaning of 28 U.S.C. §1257.[1]

With respect to finality, the posture of this case is similar to *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 43 L.Ed. 2d 328 (1975), and *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). As in those two cases, it is possible that petitioners here will prevail at the trial on state law grounds[2] thereby mooting the important consti-

1. See *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 237 n.1 (1967); *Williams* v. *Florida*, 399 U.S. 78, 80 n.5 (1970). *Cf. Gotthilf* v. *Sills*, 375 U.S. 79, 80 (1963).

2. Petitioners maintain that the publication complained of is true and expect that a jury would agree.

tutional issues raised in this petition. But this result "would be intolerable" because delaying final decision of the First Amendment issues until after trial will "leave unanswered . . . an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press," *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S., at 247, n.6, through "unwarranted restrictions on the press should the state court's constitutional judgment prove to be in error." *Cox Broadcasting Corp.* v. *Cohn,* 43 L.Ed.2d, at 343, n.12. Most significantly, denial of certiorari "might seriously erode Federal policy" until a similar case can reach this Court some time in the future. 43 L.Ed.2d, at 342.[3]

Furthermore, as discussed at pp. 11-14 *infra,* petitioners contend that subjecting them to the expense and burden of a jury trial and of further appellate proceedings in the state courts infringes their federal constitutional rights and impermissibly chills the exercise of First Amendment freedoms by other publishers. See *Cox Broadcasting Corp.* v. *Cohn,* 43 L.Ed. 2d, at 344: "[Petitioners] may prevail at trial on non-federal grounds, it is true," but if the court below erroneously denied petitioners' First

3. The pragmatic interpretation of the finality requirement under 28 U.S.C. §1291 where a Federal decision sought to be reviewed is "fundamental to the further conduct of the case" lends further support to a finding of finality here. See, *e.g., Gillespie* v. *United States Steel Corp.,* 379 U.S. 148, 153-154 (1964); and see, generally, Redish, *"The Pragmatic Approach to Appealability in the Federal Courts",* 75 Colum.L.Rev. 89 (1975). See also *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949):

> "When that time ["final" judgment] comes, it will be too late effectively to review the present order . . . ."

Amendment rights "there should be no trial at all." The Appellate Division's judgment on this issue meets all tests of finality since it is not appealable to a higher state court, is binding on the trial court, and will not survive the remand to the trial court for purposes of further appellate review by the state courts or by this Court. *Cox Broadcasting Corp.* v. *Cohn,* 43 L.Ed. 2d, at 341. In short, the result is effectively the entry of summary judgment against petitioners on the constitutional issues.

The case also meets the principles of finality set forth in *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores,* 414 U.S. 156 (1973), in that there is no way that petitioners can preserve the constitutional issues short of intolerable delay and inordinate expense:

(a) The fact that petitioners may prevail on state grounds at the trial or post-trial appeal lends added support to finality since in that event "the battle over the [constitutional issue] will be lost as far as this case is concerned." 414 U.S., at 163.

(b) On the other hand, if petitioners lose at trial on state grounds, and then successfully appeal on federal constitutional grounds, a full second trial will be necessary (unless summary judgment is granted on such appeal). A second trial, at that stage, would "result in a completely unneccessary waste of time and energy in judicial systems already troubled by delays due to congested dockets," 414 U.S., at 160, quoting *Mills* v. *Alabama,* 384 U.S. 214, 217-8 (1966). Here, this Court's reversal of the Appellate Division could end the litigation.

If, for whatever reason, the federal issues raised in this petition are mooted, the fundamentally erroneous Appellate Division decision herein would stand as the New York State interpretation of the Constitution. This would indeed be "intolerable," particularly in the light of this Court's recent decision in *Bigelow* v. *Virginia*, 44 L.Ed.2d 600 (1975).

Questions Presented

1. Whether an advertisement by a newspaper containing material of clear public interest is automatically deprived of First Amendment protection solely because it has the "commercial" purpose of soliciting subscribers and purchasers.[4]

2. Whether, in a public official's action for libel and invasion of privacy complaining of an advertisement seeking broader dissemination of a newspaper by summarizing the newspaper's previously published article critical of the official's conduct in office, the First Amendment requires the plaintiff to establish knowing or reckless falsity as defined by *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

3. Whether the First Amendment requires a public official to make a minimum evidentiary showing of knowing or

4. The decision below answered this question in the affirmative, holding that all commercial advertisements, regardless of their content or the nature of the product advertised, were outside the scope of First Amendment protection. Appendix A, *infra*, p. 3a. This Court's decision to the contrary in *Bigelow* v. *Virginia*, 44 L.Ed.2d 600 (1975), was announced after the decision below and after expiration of the time to seek rehearing in the court below. Accordingly, while petitioners would prefer that this Court reach the merits, an appropriate disposition of this petition would be to grant certiorari and remand to the Appellate Division for reconsideration in light of *Bigelow* v. *Virginia*.

reckless falsity before subjecting his critics to protracted defamation and privacy litigation, including a trial on the merits.

Statement

Petitioners are defendants in an action for libel and invasion of privacy[5] brought by a sitting Justice of the Supreme Court of the State of New York, based upon an advertisement (reproduced in Appendix D, *infra*, p. 14a) that summarized a news article published in *The Village Voice* critical of the judge's behavior in open court and his handling of narcotics cases, and referred to other articles critical of his judicial conduct published in *The New York Times* and *New York Magazine*.

The article, published in the *Voice* on August 31, 1972, was based on a reporter's investigation into judicial leniency toward reputed narcotics dealers and organized crime figures in New York. Petitioner Scali, McCabe, Sloves, Inc., a professional advertising agency, placed the advertisement in *The New York Times* on February 25, 1973 on behalf of petitioner The Village Voice, Inc. The advertisement called for greater public involvement in matters of questionable judicial conduct and explained the legally available remedies for judicial misconduct. It also emphasized that *The Village Voice* had published an important story several weeks before articles on the same subject—and the same judge—appeared in *The New York Times* and elsewhere; this was cited as an example of the *Voice's*

5. Respondent's amended complaint asserts two causes of action. The first is for libel. The second cause of action, brought pursuant to N.Y. Civil Rights Law §§50-51, is for invasion of privacy in the use of respondent's name and likeness.

superior investigative reporting and a reason for purchasing and subscribing to *The Village Voice*.

In the court of first instance, petitioners raised the first two questions presented here in their answers, which pleaded as affirmative defenses that the publication complained of concerned the performance of the judge's official duties and other important public matters, was published without malice and in the reasonable belief that it was true, and was therefore a privileged exercise of the freedom of the press guaranteed by the United States Constitution. After lengthy discovery, respondent moved to strike the First Amendment defenses and petitioners cross-moved for summary judgment on the First Amendment ground. Petitioners' papers and briefs on respondent's motion to strike also raised the first two questions presented here, and their motions for summary judgment raised all of the questions presented in this petition.

The court of first instance struck petitioners' First Amendment defenses and denied summary judgment. Petitioners appealed, raising the three questions presented here in their briefs and oral argument. The Appellate Division affirmed in the respects material here and denied petitioners' motion for permission to appeal to the Court of Appeals.

The court below, in holding the First Amendment defenses inapplicable to petitioners' advertisement, ruled that all commercial advertisements were unprotected by the First Amendment:

> "Freedom of the press has never been extended to commercial advertising matter (*Valentine* v. *Chrestensen*, 316 U.S. 52)." Appendix A, *infra*, at p. 3a.

Reasons for Granting the Writ

This petition raises crucial issues of the freedom of the press to criticize government officials and to comment upon matters of compelling public interest. The decision below seriously impedes the dissemination of news and commentary by imposing a judicial penalty on republication of constitutionally protected material in a newspaper's advertisements. The decision below also impairs the freedom of the press by departing from the constitutionally required standard of proof of knowing or reckless falsity and thus encourages frivolous, but still expensive and burdensome, suits by public officials against their critics.

I. The decision below is contrary to *Bigelow* v. *Virginia*.

As noted earlier, the decision below held that the First Amendment affords no protection whatever to commercial advertisements. This Court held the contrary in *Bigelow* v. *Virginia*, 44 L.Ed. 2d 600 (1975), which was announced after the decision below was rendered and after the time to move for reargument had expired.

As in *Bigelow*, the advertisement in this case "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest'." 44 L. Ed.2d, at 612. Moreover, the "product" advertised in this case — a newspaper — is itself constitutionally protected, just as the activity advertised in *Bigelow* pertained to constitutional interests.

The advertisement in suit here contains far more traditional First Amendment matter than the one in *Bigelow*. It presents a newspaper's reportage and editorial position on the conduct of elected officials, the need for reforming New York's judiciary, and a plea for public participation in that reform. It also informs the pubic of the means available under New York law for disciplining or removing errant judges. *Cf.*, 44 L.Ed.2d, at 612 (informing public of a state's abortion laws).

In sum, *Bigelow* v. *Virginia* requires reversal of the decision below.

II. The ability of the press to disseminate news and commentary is unconstitutionally impeded by the decision below.

The decision below has had, and until overruled will continue to have, an immediate, substantial, and immeasurably deleterious impact on the ability of the press to disseminate constitutionally protected publications through advertising. As in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), the constitutional uncertainty created by the Appellate Division's decision "restricts the present exercise of First Amendment rights," 418 U.S., at 247, n.6, by forcing publishers in practice to modify their historic method of advertising their publications with the unwelcome result of "reduc[ing] materially the flow of information and opinion which such advertisements represent." (Appendix G, *infra*, pp. 25a-26a.) A final and explicit resolution of the issues raised by this petition is urgently required to protect newspaper and book publishers who

have routinely reproduced portions of their publications in advertisements in the secure belief that the contents of such advertisements enjoy the same protection as the original publications themselves.[6]

This Court has consistently held that the First Amendment protects the circulation and dissemination of literature even though it is sold for profit. *Smith* v. *California*, 361 U.S. 147, 150 (1959) *Grosjean* v. *American Press Co.*, 297 U.S. 233, 249 (1936); *Ex parte Jackson*, 96 U.S. 727, 733 (1878).[7] Advertising that exposes the public to the content and quality of books and periodicals is a traditional and vital part of the dissemination process and enables the press to perform its constitutionally assigned role in debate on public affairs. *Booth* v. *Curtis Publishing Co.*, 15 A.D. 2d 343, 223 N.Y.S. 2d 737 (1st Dep't), *aff'd*, 11 N.Y. 2d 907, 182 N.E. 2d 812, 228 N.Y.S. 2d 468 (1962).

The burden of the decision below falls most heavily upon those controversial books, pamphlets, and periodicals that might provoke retaliation. Many of these are fledgling publications that depend chiefly upon advertising to attract

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6. Both *The New York Times* and *The Wall Street Journal* have been advertised in other media by the reproduction of portions of their newspapers; indeed, *The Wall Street Journal* "from time to time has republished the entire front page of the Eastern Edition of The Wall Street Journal in the same day's edition of The New York Times." (Appendix G, *infra*, p. 24a.) Yet the necessary impact of the Appellate Division's clearly erroneous decision in the instant case is that the entire front page of *The Wall Street Journal* would be denied First Amendment protection simply by republication in a different paper.

7. See Mr. Justice Stewart, *"Or of the Press,"* 26 Hastings L. J. 631, 633 (1975):

> "[T]he Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection."

an audience for their point of view. Even if their publishers are willing to run the risk of suits commenced by those who are angered by what they say, without constitutional protection, the newspapers, magazines, and radio and television stations that have heretofore carried their advertising may well refuse to do so, or at the very least may require their advertisements to be censored. Such censorship, of course, is antithetical to the Nation's commitment to robust debate on issues of public concern. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

III. To require a newspaper to defend protracted litigation, without requiring a constitutionally adequate showing of knowing or reckless falsity, violates First Amendment policy.

This Court has never considered whether the federal Constitution prohibits the states from permitting public officials to subject their critics to lengthy and costly litigation absent any preliminary showing of knowing or reckless falsity. However, the federal courts of appeal have recognized that the policy of fostering free, robust, and uninhibited debate, which was the premise of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269-272 (1964), will not fully be realized if public officials can put their critics to the expense and burden of lengthy litigation culminating in a plenary trial. See *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir.), *cert. denied*, 385 U.S. 1011 (1967):

> "In the First Amendment area, summary procedures are . . . essential . . . . One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First

> Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes . . . ."

Accord, *Time, Inc.* v. *McLaney,* 406 F.2d 565, 566 (5th Cir.), *cert. denied,* 395 U.S. 922 (1969):

> "[T]he failure to dismiss a libel suit might necessitate long and expensive trial proceedings, which, if not really warranted, would themselves offend the principles enunciated in Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116, 14 L.Ed. 2d 22, because of the chilling effect of such litigation."

See, *e.g., Treutler* v. *Meredith Corp.,* 455 F.2d 255, 259 (8th Cir. 1972); *United Medical Laboratories* v. *Columbia Broadcasting System,* 404 F.2d 706, 712 (9th Cir.), *cert. denied,* 394 U.S. 921 (1969); *Bon Air Hotel, Inc.* v. *Time, Inc.,* 426 F.2d 858, 863-7 (5th Cir. 1970); *Meeropol* v. *Nizer,* 381 F.Supp. 29, 32 (S.D.N.Y. 1974).

Hence, these cases held that First Amendment policy requires that a public official or figure proffer evidence sufficient to satisfy the constitutional standard of knowing or reckless falsity. *E.g., Washington Post Co.* v. *Keogh,* 365 F.2d, at 971; *Time, Inc.* v. *McLaney,* 406 F.2d, at 573. This evidence, read in the light most favorable to the plaintiff, must establish knowing or reckless falsity with "convincing clarity." *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 275-6 (1964). It must indicate that the defendant actually entertained serious doubts as to the truth of the publication, *St. Amant* v. *Thompson,* 390 U.S. 727, 731

(1968), or was keenly aware of its probable falsity, *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964).

Petitioners submit that the First and Fourteenth Amendments require the states to apply the same standard in pretrial proceedings to test the evidentiary sufficiency of a public official's action for defamation. Any other result would invite forum shopping between state and federal tribunals by plaintiffs in actions for defamation.

The Appellate Division applied a different and constitutionally inadequate standard. It apparently held that a public official's action for libel will survive a motion for summary judgment, and must proceed to a plenary trial, if the official adduces any *scintilla* of evidence that the defendant should have questioned the publication's accuracy. That this was the unarticulated standard adopted below is manifest from the one piece of evidence that was held to raise a triable issue: a letter (Appendix E, p. 16a, *infra*) to one of the petitioners that stated in general, conclusory terms that an October 12, 1972 *Voice* article about respondent and another judge contained unidentified statements that were inaccurate and incomplete. However, this letter did not point out any misstatement in the article, nor did it state any facts or identify any sources (or offer to supply them) to support the charge of inaccuracy. More importantly, the advertisement in suit here was based upon a *Voice* article of August 31, 1972, which prior to the publication of the advertisement in suit was never questioned, and not the October 12 article referred to in the letter.

The notion that such evidence could sustain a finding of knowing or reckless falsity is a complete abandonment

of the principles of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

By applying an impermissibly lenient standard and permitting officials to subject their critics to expensive, protracted litigation without any evidence of knowing or reckless falsity, the decision below subjects the press to the harassment of unfounded lawsuits and requires publishers "to become self-censors." *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir.), *cert. denied*, 385 U.S. 1011 (1967). It is thus contrary to First Amendment policy and the teachings of *New York Times Co.* v. *Sullivan* and subsequent decisions by this Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted and the case set down for argument. In the alternative, the petition should be granted and the case remanded to the Appellate Division for further consideration in the light of *Bigelow* v. *Virginia*, 44 L.Ed. 2d 600 (1975).

Respectfully submitted.

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